Filed 10/5/09 P. v. Kirk CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LARRY KIRK, Defendant and Appellant.	C060557 (Super. Ct. No. 08F00227)

Defendant Larry Kirk appeals following a bench trial and conviction for making criminal threats (Pen. Code, § 422[1]), with

---

[1] Undesignated statutory references are to the Penal Code.

Section 422 provides in part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to

one prior serious felony conviction (§§ 667, subds. (b)-(i), 1170.12). Defendant's sole contention on appeal is that the evidence is insufficient to support the section 422 conviction. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The prosecution, by an amended information, alleged that on January 9, 2008, defendant made a criminal threat against (his wife) "MARY DOE" (§ 422) and that defendant had three prior serious felony convictions (§§ 667, subds. (b)-(i), 1170.12) for burglary in 1984, burglary in 1986, and attempted terrorist threats (§§ 422, 664) in 2006.

Evidence adduced at the bench trial included the following:

Defendant, his wife Mary, and Mary's 17-year-old twin daughters lived in a two-bedroom apartment which became overcrowded when others moved in -- Mary's adult son (Marshawn) along with his wife (Alisha) and four small children, and three other grandchildren of Mary's.[2]

Mary testified that on the evening of January 8, 2008, an argument broke out between defendant and Alisha over the

---

exceed one year, or by imprisonment in the state prison. [¶] For the purposes of this section, 'immediate family' means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household."

[2] We adopt the parties' usage of first names.

disciplining of one of Alisha's children. Defendant called Alisha a bitch, which enraged Marshawn, who "barreled" toward defendant. Others held Marshawn back. Defendant, who was also irate, told them to get out of his house. Marshawn said he had paid rent and was not leaving. (Mary testified there was no agreement about rent, but Marshawn had given them money for that month's rent because they lacked the funds.) Defendant grabbed a knife from the kitchen. Mary implored him to put down the knife, and he did. However, he took another knife and held it up near his own ear with his fist clenched. At some point, he put the second knife down.

The argument continued, with defendant telling Marshawn's family to leave, and Marshawn refusing. Defendant picked up a 17-inch glass vase containing glass marbles and threw it at the (wood and glass) coffee table, spraying broken glass everywhere. Everyone started screaming. Two men knocked at the door and asked if they should call the police. Defendant said yes, call the police. Mary said no, she would handle it. The warring factions retreated to separate bedrooms. Mary started cleaning up the glass and heard defendant "ranting and raving" in his bedroom, blaming Mary for being a coward, saying he wanted a divorce and was leaving that night.

The police arrived and spoke with people individually. They asked Mary if she wanted her son's family to go, and she said no. They asked what she wanted them to do, and she said she would handle the situation.

After the police left, defendant walked back and forth between his bedroom, the kitchen, and outside. He had a cell phone and some papers. He came back upstairs and told Mary, "tell your son to get his motherfucking things out of my car." Mary went outside, where defendant was tossing things out of the car. As she removed the remainder, defendant went upstairs and threw Mary's purse down the stairs. She picked it up and went back to the kitchen. Defendant came in and said, "All you guys have to leave tonight." She refused and said it was her house. He said it was his house. She said they were not going anywhere. He said, "Oh, yeah, you are 'cause if you don't, you know, I'll burn this MF'n house down with all y'all in it."

At first, Mary thought he was just "blowing off steam" and did not think he would actually burn the house down. However, he kept saying it over and over again, at least five or six times. He called her stupid and weak and said he wanted a divorce. He said, "You should have known what type of nigga' you was messing with [*sic*]." He just kept talking. At one point, he said, "I'm gonna get my homies and come over here and ya'll gonna leave here tonight."

Mary became scared because there was more seriousness in his voice, and she remembered him once telling her that he had committed four murders in self-defense and hoped she would not hold it against him. She understood the reference to "homies" to mean that defendant would have his friends come and hurt her and her family.

The trial court and the parties through their lawyers agreed that the trial judge could consider Mary's testimony regarding fear from an earlier hearing pursuant to Evidence Code section 402. Mary testified that defendant got angry on prior occasions, but he was not violent and would just walk away. But "this particular day it was like a new Larry that I never saw before, you know." After he repeated the words, she thought he would really burn down the house, and she became terrified. Because she was afraid of defendant, she waited until he went outside again, and then she called the police. The transcript of the 911 call shows she told the operator about the prior police visit but said defendant was now threatening her life, saying he was going to burn the house down. She testified that, this time, she wanted him arrested, because she was terrified.

Mary did not see any lighter or matches in defendant's possession that day.

Marshawn denied assaulting defendant and testified defendant said, "You guys aren't going to make it 'til morning. I'm going to call my boys. They're going to come over here. You guys will not make it out tomorrow. I will burn this mother fucker down."

One of Mary's twin daughters testified that no one got physical during the argument, and defendant did not try to use the knife, but after defendant broke the vase, family members had to keep Marshawn and defendant apart. When defendant made the threat ("I'm going to burn this house down"), she felt a

little scared for her safety and scared that something would happen to her brother.

A deputy sheriff testified he spoke with defendant in the first 911 dispatch and did not recall defendant saying he had been assaulted, nor did he recall anyone mentioning a knife. In the second 911 dispatch, Marshawn claimed he had told the deputy about the knife. The deputy testified Marshawn seemed upset but not particularly scared.

Defendant testified in his own behalf. He denied ever threatening to burn down the apartment. He was frustrated by having 13 people live in his small apartment, with himself as the only one employed and paying the bills. He argued with Alisha about child discipline and called her a bitch. Marshawn struck him in the face for doing so. Defendant threw the vase at the table to fend off further attack by Marshawn. Defendant made his way outside and called 911. He thought his life was threatened, because Marshawn said he was going to "fuck me up" for calling Marshawn's wife a bitch. The transcript of the 911 call shows defendant said he wanted to press charges against someone who attacked him and wanted his wife removed from the house. The police had already received a call from a neighbor.

After Mary told the police she would handle the situation, and the police left, defendant took off his wedding band and gave it to Mary, telling her "you sorry-ass bitch, in the morning I'm getting a divorce from you. You let your son and your daughter jump on me and you didn't even try to stop them.

You w[ere] trying to help them. I'm getting the fuck up out of here. I'm divorcing you." Defendant testified he was hurt and angry but would not harm them.

Defendant admitted he was previously convicted of attempted criminal threat.

The trial court, as the trier of fact, found defendant guilty of making a criminal threat in violation of section 422 and found true the three prior conviction allegations.

Upon defendant's section 1385 motion, the trial court struck the two prior burglary convictions, leaving in place only the one strike for the 2006 attempted terrorist threat.

The court sentenced defendant to six years in prison (the upper term of three years, doubled for the strike).

DISCUSSION

Defendant contends the evidence is insufficient to support the section 422 conviction. We disagree.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-

1054.) This standard applies in bench trials as well as jury trials. (*People v. Leslie* (1964) 224 Cal.App.2d 694, 701-702.)

"In order to prove a violation of section 422 [fn. 1, *ante*], the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat--which may be 'made verbally . . .'--was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228; accord, *In re George T.* (2004) 33 Cal.4th 620, 630.)

Defendant argues the evidence is insufficient as to each element.

As to the first element (the threat), substantial evidence is found in the testimony of Mary and Marshawn that defendant threatened to burn the house down that night with the family in it.

In arguing to the contrary, defendant admits he behaved badly that day but maintains the words attributed to him are merely "angry utterances" or "ranting soliloquies" and therefore do not violate section 422, no matter how violent the words are. We reject this argument, which is based on a misreading of *People v. Teal* (1998) 61 Cal.App.4th 277. In *Teal*, the defendant argued there was insufficient evidence that he knew the victim was home and within earshot when the defendant tried unsuccessfully to smash open the victim's door and yelled, "I'm going to kill you, you son of a bitch. When's the court date?" and uttered primal screams, "Oww, Oww," (*Id.* at p. 280.) The defendant argued the evidence showed no more than "an angry catharsis, a ventilating monologue whose only purpose was emotional release." (*Id.* at p. 281.) The appellate court "agree[d] that section 422 is not violated by mere angry utterances or ranting soliloquies, however violent. One may, in private, curse one's enemies, pummel pillows, and shout revenge for real or imagined wrongs--safe from section 422 sanction. [¶] But we disagree section 422 requires certainty by the threatener that his threat has been received by the threatened person. . . . [I]f one broadcasts a threat intending to induce sustained fear, section 422 is violated if the threat is received and induces sustained fear--whether or not the threatener knows his threat has hit its mark." (*Ibid.*)

Thus, *Teal* does not stand for the proposition that section 422 is not violated by angry utterances or ranting soliloquies.

Here, defendant's words were spoken directly to people who were in his presence. Defendant threatened to kill them that night by arson. This constitutes substantial evidence of a threat under section 422.

As to the second element (intent that the statement be taken as a threat), intent may be proved by circumstantial evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 35; *People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.) Substantial evidence of intent is found in the testimony that defendant was extremely angry at Mary and her family; he insisted Marshawn's group move out, but they defied him, and Mary backed them up; he threatened to harm or kill them by burning down the apartment with everyone in it; his wife (who knew him well) detected a change in him as the evening progressed that led her to conclude he was no longer just blowing off steam; and defendant meant the words to be taken as threats because he was attempting to intimidate and force his will upon Mary and her family.

Defendant argues that, even when viewed in the light most favorable to the judgment, the words about burning the place down with everyone in it cannot be taken seriously, in light of the surrounding circumstances -- e.g., his legitimate agitation at 13 people living in a small space, and Mary's initial conclusion that defendant was just blowing off steam. Defendant quotes from *People v. Solis* (2001) 90 Cal.App.4th 1002: "[I]n the context of determining whether conditional, vague, or ambiguous language could be the predicate for a conviction of

making terrorist threats, . . . all of the surrounding circumstances should be taken into account to determine if a threat falls within the proscription of section 422. This includes the defendant's mannerisms, affect, and actions involved in making the threat as well as subsequent actions taken by the defendant." (*Id.* at p. 1013.) However, defendant is simply wrong in his view that the surrounding circumstances compel a conclusion that his words "cannot" be taken seriously. That some evidence might have supported a different finding by the trier of fact does not establish insufficiency of the evidence warranting reversal, because in substantial evidence review, "'the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]. It is of no consequence that the [trier of fact] believing other evidence, or drawing different inferences, might have reached a contrary conclusion.' [Citation.]" (*People v. Castro* (2006) 138 Cal.App.4th 137, 140, italics omitted.)

Accordingly, substantial evidence supports the second element.

As to the third element (threat was so unequivocal, unconditional, immediate, and specific as to convey a gravity of purpose and an immediate prospect of execution), we recently

observed, in rejecting a substantial evidence challenge to a section 422 conviction: "'To constitute a criminal threat, a communication need not be *absolutely* unequivocal, unconditional, immediate, and specific. The statute includes the qualifier 'so' unequivocal, etc., which establishes that the test is whether, in light of the surrounding circumstances, the communication was *sufficiently* unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution.' [Citation.] '[W]hether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an . . . immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone.' [Citation.] '[I]t is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422.' [Citation.] The [trier of fact] is 'free to interpret the words spoken from all of the surrounding circumstances of the case.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1433.) In *Hamlin*, the defendant argued the evidence showed only a conditional threat, because an audiotape revealed he said to his wife, "I'll kill you now if you," followed by an inaudible portion of the audiotape. (*Id.* at p. 1433.) We held the jury reasonably could have determined, from the surrounding circumstances including words captured on tape before and after the threat, that the defendant essentially

threatened to kill his wife if she did not cooperate and answer his questions. (*Ibid.*)

Here, there is evidence that defendant threatened to burn down the apartment that night with everyone in it. That his words were facially conditional ("if you don't [leave] I'll burn [it] down") does not warrant reversal. "'A threat which may appear conditional on its face can be unconditional under the circumstances. . . . [¶] Language creating an apparent condition cannot save the threatener from conviction when the condition is illusory, given the reality of the circumstances surrounding the threat. A seemingly conditional threat contingent on an act highly likely to occur may convey to the victim a gravity of purpose and immediate prospect of execution.' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 340.)

Here, defendant and Mary had already drawn their lines in the sand, with Mary adamant about keeping her extended family in the apartment against her husband's demands -- even after defendant threw the vase and threatened divorce. Thus, the threat was sufficiently unconditional.

Defendant argues there was no immediacy to the threat, which he views as a vague reference to the future. However, defendant's threat, which he made around 8:00 p.m., was that he would set the fire that very night.

Defendant argues this case is similar to *In re Ricky T.* (2001) 87 Cal.App.4th 1132, which found insufficient evidence of a section 422 violation where the minor did not make a specific

threat and did nothing to further the act of aggression. The two cases are not similar. The teen in *Ricky T.* left a high school classroom to use the restroom, returned to find the classroom door locked, pounded on the door, was accidentally hit on the head when the teacher opened the door, got mad, cursed, and told the teacher, "I'm going to get you." (*Id.* at p. 1135.) The lack of any conduct by the minor to "further the act of aggression," such as pushing or shoving the teacher, was significant because the threat was vague and not immediate. (*Id.* at p. 1138.) Additionally, there was no evidence of any prior history of disagreement or hostility between student and teacher. (*Ibid.*)

Here, the threat -- to burn down the house that night with everyone in it -- is specific (not vague) and sufficiently immediate. Moreover, there is evidence of ongoing hostility. Defendant says there is no evidence that he previously assaulted the victim, as was the case in *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1432. However, *Gaut* merely cited the prior history of domestic abuse as a factor relevant to the element of the victim's fear; it did not make prior history of assault on the victim a prerequisite to finding that the victim felt fear.

We conclude there is substantial evidence of the third element.

As to the fourth and fifth elements (sustained and reasonable fear of the victim), the element has objective and subjective components, in that the victim must actually be in

sustained fear, and the sustained fear must be reasonable under the circumstances. (*Ricky T., supra*, 87 Cal.App.4th at p. 1140.) "Sustained fear" must extend "beyond what is momentary, fleeting, or transitory." (*Ibid.* [evidence did not support finding that teacher's fear was sustained fear, where the school did not notify the police of the incident until the following day].)

There is substantial evidence that Mary had sustained fear. After having told the police she could handle the family dispute, she set about cleaning up the mess in the apartment but became afraid when she saw a change in defendant, who got a "crazed look" in his eye as he issued his threats. He was a "new Larry" she had never seen before. His behavior caused her to remember he previously told her he killed four people, was (falsely) charged with criminal threat against a bus driver, and had psychological issues. She testified, "At least fifteen minutes, and, you know, I'm watching him pace back and forth, and I'm seeing the crazed look in his eyes, and the anger is building, and that in turn made me think of all the things he had told me, and, you know, just the anger in him, and when I saw the anger, and he wouldn't stop saying it, that's when I took him seriously, and, yes, I got scared." Once she decided to phone the police, Mary's fear of defendant caused her to wait until defendant went outside before she called 911. She told the 911 operator that defendant was threatening her life. Even at the time of trial, she testified she was still afraid of

defendant if he were released from custody, though she did not want him to get a harsh sentence.

Defendant claims Mary denied thinking about any aspect of his criminal past at the time of the instant incident. Not so. What she said was that she thought about his having talked about being previously charged with making criminal threats, but she did not think about the particulars such as the alleged victim being a bus driver.

Defendant says the court noted defendant had never been charged with or arrested for murder. However, this does not matter. The relevance is not in the truth or falsity of prior criminal charges, but in what defendant told Mary and the effect it had on her state of mind, i.e., was her fear reasonable.

The total evidence, set forth above, provides substantial evidence that Mary's fear was reasonable, including: He previously told her of criminal conduct and mental problems. She had seen him angry before, but not like this. He took on a "crazed look" and said he would enlist his "homies" to burn down the apartment that night with Mary's extended family in it.

That Marshawn did not seem scared and Mary's daughter admitted only to being "a little bit scared" does not, as defendant claims, render Mary's fear inadequate to support a section 422 conviction.

We conclude substantial evidence supports the judgment.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

HULL, J.

BUTZ, J.